UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X
UNITED STATES OF AMERICA, :
06 Cr. 1107 (JFK)
-against- :
OPINION and ORDER
EDWARD DeJESUS, :

Defendant. :
----------X

APPEARANCES:

For the United States of America:
MICHAEL J. GARCIA
United States Attorney
Southern District of New York
New York, New York
Of Counsel: William J. Harrington, Esq.
Assistant United
States Attorney

For the Defendant:
LEONARD F. JOY
Federal Defenders of New York
New York, New York
Peter N. Tsapatsaris, Esq.

JOHN F. KEENAN, United States District Judge

JOHN F. KEENAN, United States District Judge:

Motion

Defendant moves to suppress statements and physical evidence obtained on October 20, 2006.

Background

At approximately 10:00 p.m. on October 20, 2006, NYPD police officers were surveilling drug sales at 184th Street and Washington Avenue in the Bronx. After witnessing a sale, the officers moved in to apprehend the persons involved in the sale.

As the officers moved in, one of them saw the butt and part of the barrel of a gun in the defendant's hand. A second officer could also see a gun in the defendant's hand. Although the officers had not seen the defendant participate in a drug sale, he was standing nearby.

The officers yelled "Gun!" and a number of them subdued DeJesus by putting him up against a wall. At least one of the officers still saw the gun in DeJesus' hand as he was put against the wall.

After the arrest, the officers brought defendant to the police station. After being advised of his rights, DeJesus waived those rights and stated, in substance, that:

* He was carrying a firearm because he had killed someone ten years earlier.

* The family of the victim lived around the corner from where DeJesus was arrested, and he carried the gun for protection.

DeJesus was interviewed a second time on October 21, 2006 by other officers. He again waived his right to remain silent and stated, in substance, that:

* He brought the gun because he had shot and killed someone years earlier. He had the gun for his protection.

* He said that when the cops moved in, he had the gun in his hand. When they were putting him against the wall he tried to hide the gun in his hand.

The above facts are gleaned from the Magistrate Court's Complaint in the case.

DeJesus had previously been convicted on or about January 9, 1997, in Bronx Supreme Court, Bronx County, of manslaughter in the first degree, with intent to cause serious physical injury, a class B felony.

The defendant argues that the officers recovered the gun after searching him without probable cause. DeJesus urges that the statements must be suppressed as the tainted fruit of a poisonous tree.

Defendant attaches a declaration to his motion. In it, he offers one sentence about the purported illegal search: "The firearm was not in plain view before the arrest." (Defendant's

Declaration ¶ 4). He does not state where the firearm was or where the officers searched. He does not deny the sworn allegation in the Complaint that he had the gun in his hand or that he admitted as much.

Discussion

The sworn Magistrate's Court Complaint states that the officers recovered the gun without a search after seeing it in his hand while he was standing on the street. The defendant has not submitted a sworn statement that contradicts these facts with the requisite degree of specificity.

To have an evidentiary hearing on his claim, a defendant must first "state sufficient facts which, if proven, would [require] the granting of the relief requested." United States v. Kornblau, 586 F. Supp. 614, 621 (S.D.N.Y. 1984), see United States v. Mathurin, 148 F.3d 68, 69 (2d Cir. 1998); United States v. Ortiz, 99 Cr. 532, 1999 WL 1095592, at *1 (S.D.N.Y. 1999). A defendant must present his claim through an affidavit of an individual with personal knowledge of the relevant facts. See United States v. Gillette, 383 F.2d 843, 848-49 (2d Cir. 1967); United States v. Viscioso, 711 F. Supp. 740, 745 (S.D.N.Y. 1989). In such an affidavit, the defendant must show "that disputed issues of material fact exist before an evidentiary hearing is required." Viscioso, 711 F. Supp. at 745 (internal quotation and citation omitted). An evidentiary hearing on a

motion to suppress is required only if "the moving papers are sufficiently definite, specific, detailed, and nonconjectural to enable the court to conclude that contested issues of fact" are in question. United States v. Pena, 961 F.2d 333, 339 (2d Cir. 1992). These papers do not meet that test.

Defendant cannot create an issue with an affidavit asserting conclusory statements. See United States v. Ruiz, 94 Cr. 392 (LAP), 1994 U.S. Dist. LEXIS 15822 (S.D.N.Y. Nov. 7, 1994), at *13 (denying defendant hearing where affidavit lacked specific facts and only stated that the police acted "for no apparent reason"); United States v. Vicioso, 711 F. Supp. 740, 745-46 (S.D.N.Y. 1989)(denying hearing where defendant disputed probable cause to arrest on affidavit stating that defendant "was not doing anything illegal at the time of his arrest" and he "was not involved in dealing crack" on earlier occasion).

No hearing is warranted because the defendant does not controvert any of the facts alleged in the Complaint. DeJesus merely asserts a legal conclusion - that the gun was not in "plain view." The question of whether something is in plain view is the ultimate legal conclusion that the court is required to reach. If taken as a factual allegation, DeJesus' statement lacks any particularity or specificity.

Defendant does not deny (1) that he had the gun in his hand; (2) that the officers shouted "Gun!" as they approached;

and (3) that the gun was seen before it was seized and DeJesus was ever searched. His conclusory assertions that the gun was not in "plain view" do not amount to a denial of these facts and his affidavit does not satisfy the burden to obtain a hearing on that issue.

The reference in paragraph 5 of defendant's declaration of August 29, 2006 is obviously a mistype and nothing in the declaration addresses the Miranda issue or the voluntariness of his statements.

The motion is denied in all respects.

SO ORDERED.

Dated: New York, New York
February 7, 2007

John F. Keenan

JOHN F. KEENAN
United States District Judge